

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
ROBERT MAST (DEC'D)	:	DETERMINATION
OFFICER OF SHORE CHRYSLER	:	
PLYMOUTH, INC.	:	DTA NO. 807342
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1982	:	
through August 31, 1982.	:	

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Petitioner, estate of Robert Mast, c/o Patricia Mastantuono, Executrix, 436 Oceanpoint Avenue, Cedarhurst, New York 11516, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1982 through August 31, 1982.

On March 23, 1992 and April 9, 1992, respectively, petitioner, by its representative, Jesse I. Levine, Esq., and the Division of Taxation, by its representative, William F. Collins, Esq. (Michael C. Gitter, Esq., of counsel) executed a consent to have the controversy determined on submission, without hearing, with all briefs and documentary evidence to be submitted by July 22, 1992. Petitioner submitted a brief on June 22, 1992. The Division of Taxation submitted a brief on July 17, 1992. Upon review of the entire record, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation was authorized to issue to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, approximately six years after the corporate taxpayer filed part-quarterly sales tax returns for two months of the quarterly sales tax period but failed to file a final quarterly return.

II. Whether the Division of Taxation is estopped from issuing a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, almost six years after the close of the period

assessed.

### FINDINGS OF FACT

The Division of Taxation ("Division") issued to Robert Mast a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated April 19, 1988, assessing sales and use taxes due for the period June 1, 1982 through August 31, 1982 of \$35,210.17 plus penalty and interest.

The Division was advised of the death of Mr. Mast by letter dated April 29, 1988. A petition was filed on behalf of Robert Mast (dec'd) (hereinafter "petitioner") on September 18, 1989.

Petitioner was an officer of Shore Chrysler Plymouth, Inc. ("Shore"). Petitioner filed a long-form, part-quarterly sales and use tax return on behalf of Shore for the period June 1, 1982 through June 30, 1982, reporting tax due of \$20,210.17 and remitting payment in the amount of \$5,210.17, leaving a balance due of \$15,000.00. This return was dated August 20, 1982 and received by the Division on August 24, 1982.

Petitioner also filed a long-form, part-quarterly sales and use tax return on behalf of Shore for the period July 1, 1982 through July 31, 1982, dated August 20, 1982, reporting no sales and no tax due. Shore did not file a quarterly return for the period June 1, 1982 through August 31, 1982.

There is one fact disputed by the parties, i.e., when Shore ceased doing business. The Division claims, on the basis of a letter to the Division from Chrysler Motors, dated March 25, 1988, that Shore stopped doing business on August 19, 1992. As pertinent here, that letter states:

"Listed below is the information you requested regarding the subject dealership:

\* \* \*

"4. Effective Date of Termination:

"a. August 19, 1982."

Petitioner's representative provided two documents to support his claim that Shore ceased doing business in June 1982.

(a) The first document is a Notice of Delinquency, issued to Shore by the Division's Wage Reporting Bureau. It is dated January 25, 1983 and states that the Division had not received quarterly reports of wages paid to employees for the period July 1, 1982 through September 30, 1982. On the back of this form, petitioner provided the following statement:

"Shore Chrysler Plymouth, Inc. ceased operations as of June 18, 1982. All employees were dismissed at this time. Wage and tax forms WRS-2 were filed for all wages paid to this time. A copy of this report is enclosed."

This statement bears petitioner's signature and is dated January 27, 1983.

(b) The report of wages referred to in the above statement indicates that it is a "FINAL" return. The date of discontinuance of business in New York is shown as June 18, 1982.

In or about March 1988, the Division estimated tax due from Shore for the period June 1, 1982 through August 31, 1982. A dummy sales tax return was prepared showing gross sales and services of \$2,208,606.00, taxable sales and services of \$553,186.00, and tax of \$40,420.39. The total amount remitted on monthly returns, in the amount of \$5,210.17, was subtracted from the tax to calculate an amount due of \$35,210.17. The following statement appears on the return: "Dummy return made to pick up unapplied part-quarterly returns. Figures for August were estimated." (Emphasis added.)

Quarterly gross and taxable sales shown on the dummy return equal two times the amount reported by Shore on the return filed for June 1982.

The Division issued a conciliation order dated June 23, 1989, reducing the tax due to \$15,000.00 plus penalty and interest. The Conferee's report contains the following statements:

"The requester who passed away on July 14, 1987, was assessed as a responsible officer of Shore Chrysler Plymouth, Inc. The requester was assessed for failure of the corporation to file and pay the tax due for the August 31, 1982 quarter. The corporation was a monthly filer and filed a monthly return for June, 1982 with tax due amounting to \$20,210.17 with a partial payment of \$5,210.17. The corporation failed to file the quarterly return for the August 31, 1982 period. The requester's representative argued that the statute for assessing had expired because the assessment was issued more than three years from the monthly return.

\* \* \*

"The tax is revised to \$15,000.00 and the penalty and statutory interest is sustained because the statute has been kept open as a result of the corporation not filing the quarterly return."

### CONCLUSIONS OF LAW

A. Petitioner raises two, essentially related, jurisdictional issues. First, petitioner asserts that the three-year statute of limitations for assessment of sales and use taxes (Tax Law § 1147[b]) was triggered by the filing of sales tax returns for June and July 1982 and that no tax may be assessed by the Division for either month. In addition, petitioner contends that pursuant to the holding in Matter of Parsons v. State Tax Commn. (34 NY2d 190, 356 NYS2d 593), the Division was without statutory authority to issue a notice of determination to an officer of a corporation in order to collect taxes reported on a filed return, but remaining unpaid. Petitioner also asks that the Division be estopped from issuing a notice of determination and demand for payment of sales and use taxes due from Shore, almost six years after that corporation stopped doing business.

The Division argues that the statute of limitations did not begin to run on any part of the quarterly period ending August 31, 1982 because Shore did not file a quarterly return for that period. The Division claims that the tax assessed by the notice of determination was based upon an estimate of tax due in accordance with Tax Law § 1138(former [a]) and, therefore, that the holding in Parsons is not controlling. Finally, the Division asserts that petitioner has not alleged exceptional facts which would warrant the application of the estoppel doctrine here.

B. The Tax Law requires all vendors to file sales tax returns with the Division, reporting gross sales, taxable sales and the tax due on such sales (Tax Law § 1136). Tax Law § 1136 provides that any vendor whose taxable receipts total \$300,000.00 or more in any quarter of the preceding four quarters "shall, in addition to filing a quarterly return...file either, a long-form or short-form, part-quarterly return monthly" (Tax Law § 1136[a]). A long-form part-quarterly return is defined as "a return...providing for the calculation of the actual sales and compensating use taxes for the preceding month in the manner set forth in subdivisions (a) and (b) of section eleven hundred thirty-seven" (Tax Law § 1136[a][i]). A person filing such a return for each of the months contained in a quarter is also "required to file a quarterly return for such quarter" (Tax Law § 1136[a][i]).

Shore filed part-quarterly returns for June and July 1982 but failed to file a quarterly return as required by section 1136(a)(i). Where a required return is not filed, the Division is authorized to determine the amount of tax due based on the information available to it and issue a notice of determination (Tax Law § 1138[a][1]).<sup>1</sup> The Division estimated tax due from Shore for the month of August based upon sales reported for June and issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the quarter ending August 31, 1982. The first issue here, as presented by petitioner, is whether the notice of determination was time barred. As pertinent, Tax Law § 1147(b) provides:

"except in the case of a willfully false or fraudulent return with intent to evade the tax no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return; provided, however, that where no return has been filed as provided by law, the tax may be assessed at any time."

A quarterly return serves as both a monthly return for the last month in the quarter and as a reconciliation for the quarter (20 NYCRR 533.3[b][3]). Because of this latter function, it seems reasonable to conclude that the statute of limitation on assessment does not begin to run until the quarterly return is filed. However, the Division has cited no authority for the proposition that a part-quarterly return filed in accordance with Tax Law § 1136(a)(i) is not a "return" within the meaning of Tax Law § 1147(b), and I cannot find support for such a theory. Generally, the words of a statute are to be given their usual and ordinary meaning unless it is plain from the statute that another meaning was intended (Regan v. Heimbach, 91 AD2d 71, 458 NYS2d 286, lv denied 58 NY2d 610,

462 NYS2d 1027, rearg denied 59 NY2d 969, 466 NYS2d 1029). Applying this principle of construction, I conclude that the filing of a part-quarterly return triggers the statute of

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<sup>1</sup>Before estimating the tax due, the Division is first required to make a request of all books and records for the period sought to be assessed (see, Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859). There is no evidence that it followed such a procedure here. However, the Division's original estimate of tax due was not challenged by petitioner on this basis. In addition, as the ensuing discussion will show, the basis for the Division's estimate is not material to this determination.

limitations found in section 1147(b). Accordingly, the Division was barred from assessing "additional tax" (Tax Law § 1147[b]) for the months of June and July 1982, after the expiration of three years. However, since a quarterly return was not filed for August 1982, the Division had authority to determine additional tax due for August 1982.

C. A similar analysis applies to the second jurisdictional issue raised by petitioner. In Matter of Parsons v. State Tax Commn. (*supra*), the Court of Appeals held that Tax Law former § 1138 did not confer administrative jurisdiction on the former State Tax Commission to recover unpaid taxes where essentially correct and accurate returns were filed (*see also*, Matter of Hall v. New York State Tax Commn., 108 AD2d 488, 489 NYS2d 787). Based on that holding, petitioner takes the position that the Division has no statutory authority to collect the tax due from Shore through the issuance of a notice of determination to petitioner, because essentially correct and sufficient returns were filed by Shore for the months of June and July 1982, and no business was conducted after that date.

In 1985, Tax Law § 1138(a) was amended to provide the Commissioner of Taxation with authority to issue a notice of determination to any corporate officer, who is under a duty to act for that corporation in complying with the Tax Law, whether or not an essentially correct or sufficient return is filed (Tax Law § 1138[a][1][B], added by L 1985, ch 65, § 82, effective April 17, 1985). The decisions in Hall and Parsons are applicable only to notices issued before the effective date of the amendment (*cf.*, Matter of Thomas Kheel, Tax Appeals Tribunal, March 1, 1990). Thus, the Division was authorized to issue to petitioner a notice of determination which assessed tax on the basis of the filed no-remit June 1982 return and "additional tax" for August 1982.

D. In this proceeding, petitioner's only challenges to the notice of determination are jurisdictional. There has been no allegation that Mr. Mast is not liable for sales tax due from Shore pursuant to sections 1131(1) and 1133(a) of the Tax Law. As to the amount of tax now in issue, it is perfectly clear, despite the Division's protestations, that the conferee reduced the tax due to the amount of tax reported due but remaining unpaid for the month of June 1982,

\$15,000.00. The original assessment in the amount of \$35,210.17 had two components: (1) the balance due (\$15,000.00) from the partially paid June return and (2) an estimate of tax due for August 1982 (\$20,210.17), the amount estimated for August being equal to the amount reported for June. By its conciliation order, the Division reduced the tax amount assessed to \$15,000.00, the balance due from the partially paid June return. Although the conferee did not explicitly state his reason for reducing the tax amount to \$15,000.00, it must be more than coincidence that the amount of tax sustained by the conferee is equal to the tax due for June. Moreover, there is no evidence that Shore had any sales after June 1982. The documents provided to the Division by petitioner in 1982 and 1983 establish that Shore ceased doing business on June 18, 1982. The fact that Shore's dealership was terminated by Chrysler Motors effective August 19, 1982 does not prove that it ceased doing business on that date. In sum, although the notice of determination included an assessment of tax for the period ending August 31, 1982, the only amount which remains in contention is \$15,000.00, the amount reported on the June 1982 return.

In essence, Shore self-assessed the tax due for June 1982 by filing a return on or about August 20, 1982, rendering itself, and petitioner, liable for payment of the tax shown due on that return. As a consequence of the filing of the return, the Division had, and continues to have, the authority to bring a legal action to enforce payment of the \$15,000.00 remaining due (Tax Law § 1141). In Matter of Cadalso v. State of New York and New York State Tax Commn. (Sup Ct, Albany County, December 27, 1978, Casey, J.), the court held that the statute of limitations of Tax Law § 1147(b) does not apply to a warrant filed against an officer as a consequence of the corporation's failure to pay sales taxes as shown on its filed sales tax return. Moreover, Tax Law § 1138(a)(1)(B) provides that the provisions of that section are "not to be construed to limit in any manner the powers of the attorney general" or the Commissioner of Taxation to issue a warrant under Tax Law § 1141.

E. The Division's conduct does not form the basis for an estoppel. Inasmuch as Mr. Mast filed a return with only partial payment of the amount shown as due on that return, he must have

been fully aware of his remaining liability to the State. The Division's failure to institute collection procedures in no way hampered petitioner's ability to pay the tax due (see, Matter of G. H. Walker & Co. v. State Tax Commn., 62 AD2d 77, 403 NYS2d 811).

F. By the conciliation order dated June 23, 1989, the Division cancelled that portion of the notice of determination which assessed "additional" tax due in the amount of \$20,210.17 for the period June 1, 1982 through August 31, 1982, reducing the amount of tax due to \$15,000.00.



G. The petition of Robert Mast (Dec'd) is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on April 19, 1988, as modified by the Conciliation Order, is sustained.

DATED: Troy, New York  
September 3, 1992

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE